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2                   UNITED STATES DISTRICT COURT  
3                   WESTERN DISTRICT OF WASHINGTON  
4                   AT SEATTLE

5 HENSLEY,

6                   Plaintiff(s),  
7  
8 v.  
9  
10 UNITED STATES OF AMERICA,  
11                   Defendant(s).

12                   NO. C04-302P

13                   ORDER ON MOTION TO DISMISS  
14                   CERTAIN OF THE GOVERNMENT'S  
15                   AFFIRMATIVE DEFENSES

16                   The above-entitled Court, having received and reviewed:

- 17 1. Motion to Dismiss the Government's Affirmative Defenses Regarding Plaintiffs' Alleged Non-  
18 compliance with FTCA  
19 2. United States' Opposition to Plaintiffs' Motion to Dismiss Affirmative Defenses  
20 3. Plaintiffs' Reply in Support of Motion for Judgment on the Pleadings  
21 4. Defendant United Services Automobile Association's and USAA Casualty Insurance  
22 Company's Reply in Support of Plaintiffs' Motion for Judgment on the Pleadings

23 and all pleadings relevant thereto, makes the following ruling:

24                   IT IS HEREBY ORDERED that the motion is DENIED.

25                   **Background**

26                   Following removal of this case to federal court, the government moved for dismissal of the  
complaint on the grounds that Plaintiffs had failed to exhaust their administrative remedies by filing an  
administrative claim within the time period required by the Federal Tort Claims Act (FTCA). This  
Court denied the motion, holding that "if a civil action is instituted within the applicable state  
limitations period, an FTCA claim does not accrue for limitations purposes until the Plaintiff knows or

1 should have known that the alleged tortfeasor was acting within the scope of federal employment.”  
2 Dkt. No. 27, p. 1.

3 Plaintiffs’ motion for a stay was granted to enable them to file an administrative claim; the  
4 claim was filed and denied. Following the denial, the case returned to District Court and the  
5 government filed its answer to Plaintiffs’ Second Amended Complaint. Dkt. No. 42. It is a number of  
6 the affirmative defenses contained in that answer that Plaintiffs seek to dismiss.

7 **Discussion**

8 Plaintiffs’ claim is that, of the government’s twenty-nine affirmative defenses, nine (No’s 1-8  
9 and No. 10) concern the court’s lack of subject matter jurisdiction and the statute of limitations issue.  
10 Their argument is that, this Court having previously ruled on those issues in the motion to dismiss, the  
11 “law of the case” doctrine prohibits reconsideration of them unless: (1) the first decision was clearly  
12 erroneous; (2) the law has changed; (3) there is new evidence; (4) other changed circumstances exist;  
13 or (5) a manifest injustice would result. Thomas v. Bible, 983 F.2d 152, 154-55 (9<sup>th</sup> Cir. 1997) (*cert.*  
14 *denied* 508 U.S. 951 (1983)).

15 However, as both parties point out, the “law of the case” doctrine is a “guide to the exercise of  
16 [the Court’s] discretion.” Arizona v. California, 46 U.S. 605, 618 (1983). This is not the juncture in  
17 this litigation at which to exercise that discretion. The Court’s earlier ruling was made in the context  
18 of a FRCP 12(b) motion to dismiss on the pleadings – the facts of the case had not been developed and  
19 the non-moving party’s allegations were assumed to be true. It would be a “manifest injustice” to bind  
20 the government to that holding before it has had a chance to develop its theory of the case through the  
21 discovery process. Once discovery is completed, either side is free to bring a summary judgment  
22 motion if they believe that the undisputed facts of this case (combined with the Court’s earlier ruling)  
23 entitle them to prevail. This is not the stage of the case at which to make that determination.

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26 **ORD ON MTN FOR  
JMT ON PLEADINGS - 2**